FILED

No. 97 1671 APR 9 - 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

WHITEHALL TENANTS CORP.; HORACE BULLARD; ITA BULLARD; FRED GRUNBERG; JOSEPH JABLON; MARY JABLON; SUSAN ISAACS; PHILIP POLLACK; WALTER SPIER; ROSEMARIE SPIER; LUDWIG BRAVMANN, individually and as representatives of the class of non-sponsor shareholders of shares in Whitehall Tenants Corp.,

Petitioners,

vs.

WHITEHALL REALTY CO., a partnership; SYLVIA OLNICK, as Executrix of the Estate of Robert S. Olnick; RICHARD LANE; PAUL MILSTEIN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

HOWARD I. RHINE
Counsel of Record
R. JEFFREY MORE
COLEMAN & RHINE LLP
Attorneys for Petitioners
1120 Avenue of the Americas
New York, New York 10036
(212) 840-3330

145653

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

51pp

QUESTIONS PRESENTED

1. Whether oral argument in the United States Court of Appeals for the Second Circuit, conducted before two judges, only one of whom participated in the determination of the appeal, violates the two judge minimum quorum requirement of 28 U.S.C. §§ 46(b) and (d)?

2. Whether, in the United States Court of Appeals for the Second Circuit, determination of an appeal by two judges, only one of whom participated in the oral argument, violates the two judge minimum quorum requirement of 28 U.S.C. §§ 46(b) and (d)?

3. Whether the violation, at oral argument, of the minimum quorum requirement of 28 U.S.C. §§ 46(b) and (d), is cured by a judge not present at oral argument thereafter listening to a tape recording of that argument and then participating in the determination of the appeal?

4. Whether the three judge panel requirement of 28 U.S.C. § 46 is violated by Second Circuit Local Rule § 0.14(b) which permits a judge to withdraw from an appellate panel merely upon "request"?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding are contained in the caption of the case. The corporate petitioner has no parent companies and no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statute and Rule Involved	1
Statement of the Case	3
Reasons for Granting the Writ	4
I. The Petition Should Be Granted Because Oral Argument Before The Second Circuit Proceeded Without A Quorum In Violation Of 28 U.S.C. § 46(d) And Second Circuit Local Rule § 0.14(a).	5
II. The Petition Should Be Granted Because The Second Circuit's Practice Of Allowing Panel Members To Be Present By Listening To Tape Recordings Of The Proceedings Violates 28 U.S.C. § 46(d) And Second Circuit Local Rule § 0.14(a).	7

Contents

Page

III. The Petition Should Be Granted Because The Second Circuit's Summary Order Was Issued By A Two Judge Panel Of Variable Consistency In Violation Of 28 U.S.C. § 46(b). 8

Conclusion 12

TABLE OF CITATIONS

Cases Cited:

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 6

Murray v. National Broadcasting Co., 35 F.3d 45 (2d Cir. 1994), *cert denied*, 513 U.S. 1082 (1995) 8, 9, 10

Ortega-Rodriquez v. United States, 507 U.S. 234 (1993) 10

United States v. Glover, 731 F.2d 41 (D.C. Cir. 1984) 9

Wingo v. Wedding, 418 U.S. 461 (1974) 10

Statutes Cited:

18 U.S.C. § 1961, *et seq.* 3

28 U.S.C. § 46 ..... i, 1

Contents

	Page
28 U.S.C. § 46(b)	i, 1, 4, 5, 8, 9, 11, 12
28 U.S.C. § 46(d)	i, 1, 4, 5, 7, 8
28 U.S.C. § 1254(1)	1
Rules Cited:	
Federal Rule of Appellate Procedure 34(a)	7
Second Circuit Rule 34	7
Second Circuit Local Rule § 34(d)	11, 12
Second Circuit Local Rule § 0.14	2
Second Circuit Local Rule § 0.14(a)	4, 5, 7, 8
Second Circuit Local Rule § 0.14(b)	9, 10, 11
Second Circuit Local Rule § 0.23	11
Other Authorities Cited:	
S. Rep. No. 87–275, 97th Cong. 2d Sess. 9, *reprinted in* U.S.C.C.A.N. 11	9
Black's Law Dictionary (West 5th Ed.)	6
Webster's New World Dictionary (3d Coll. Ed.)	6

Contents

Page

APPENDIX

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Filed October 31, 1997 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of New York Dated March 19, 1997 ..... 11a

Appendix C — Opinion Of The United States Court Of Appeals For The Second Circuit Decided January 9, 1998 ..... 26a

Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit was rendered on October 31, 1997. It is not published. The opinion of the district court, dated March 19, 1997, is also not published. Petitioners' timely filed Petition for Rehearing (With a Suggestion for a Rehearing En Banc) was denied by order dated January 9, 1998. These opinions are reproduced as Appendices A, B and C respectively.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The petition has been filed within ninety days of January 9, 1998, the date on which the Second Circuit denied petitioners' timely filed Petition for Rehearing.

STATUTE AND RULE INVOLVED

28 U.S.C. § 46(b) and (d) provide, in relevant part, as follows:

> § 46. Assignment of judges; panels; hearings; quorum
>
> * * *
>
> (b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that

> court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. . . .
>
> * * *
>
> (d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

Second Circuit Local Rule § 0.14 provides as follows:

> § 0.14. Quorum
>
> (a) Two judges shall constitute a quorum. If, at any time, a quorum does not attend on any day appointed for holding a session of the court, any judge who does attend or, in the absence of any judge, the clerk may adjourn the court for such time as may be appropriate. Any judge attending when less than a quorum is present or at any time when the court is in recess may make any necessary procedural order touching any suit or proceeding preparatory to hearing or decision of the merits. (See Part 2, Local Rule 27(f).)
>
> (b) Unless directed otherwise, a panel of the court shall consist of three judges. If a judge of a panel of the court which has heard argument or taken under submission any appeal, petition or motion shall be unable to continue with the consideration of such

> matter by reason of death, illness, resignation, or incapacity, or shall be relieved of such consideration at the judge's request, the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge. If they are not in agreement or either requests such a designation, the Chief Judge will designate another circuit judge to sit in place of the judge who has become unable to continue or has been relieved. The Chief Judge shall advise the parties of such designation, but no further argument will be had or briefs received unless otherwise ordered.

STATEMENT OF THE CASE

On December 8, 1994, plaintiffs commenced this action as a putative class action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO"), and asserted other pendent state law claims. Plaintiffs alleged that various particularized wrongdoings were part of an overall scheme devised by defendants, in violation of federal criminal law, to defraud plaintiffs and to enrich themselves.

On March 21, 1997, prior to discovery having commenced and before issue had been joined, the district court granted defendants' motion for summary judgment, dismissed the federal claim under RICO and declined to exercise jurisdiction over the pendent state law claims.

An appeal to the Second Circuit Court of Appeals was timely taken on April 7, 1997. The matter was assigned to a panel of the Second Circuit Court of Appeals consisting of Hon. Guido Calabresi, Hon. Jon O. Newman, and Hon. Frank X. Altimari. Oral argument was scheduled to be heard on October 22, 1997.

Immediately prior to the commencement of oral argument, Judge Altimari excused himself and oral argument was had before Judge Newman and Judge Calabresi only. After oral argument, Judge Calabresi "withdrew" from consideration of the appeal. Judge Altimari, who was absent from oral argument, then listened to a tape recording of that argument. On October 31, 1997, Judge Newman and Judge Altimari issued a Summary Order affirming the Order and Judgment of the district court which dismissed the Complaint.

A Petition for Rehearing was timely filed by plaintiffs contending, *inter alia*, that the foregoing procedure violated the two judge minimum quorum requirement of 28 U.S.C. §§ 46(b) and (d) and Second Circuit Local Rule § 0.14(a). By decision dated January 9, 1998, the complained of procedure was declared valid by the Court of Appeals for the Second Circuit and the Petition for Rehearing was denied. That decision was sufficiently "novel" to make the front page of the New York Law Journal.

REASONS FOR GRANTING THE WRIT

In ruling that oral argument may be held before two judges, only one of whom shall participate in the determination of the appeal, and in further ruling that an appeal may be determined by two judges, only one of whom participated in the oral argument, the United States Court of Appeals for the Second Circuit has fashioned a "novel" appellate procedure that clearly contravenes the Congressionally mandated quorum requirement of 28 U.S.C. §§ 46(b) and (d).

By electing, upon the Petition for Rehearing, to issue a written opinion unequivocally endorsing this procedure, the Second Circuit has elevated the complained of practice from an error, albeit a critical error, in but a single case, to the official

policy of the Second Circuit. The publication of this "novel" opinion on the front page of the widely circulated New York Law Journal has added further prominence to this policy, ensuring its continued application.

This newly created procedure, if adopted by other circuits, or merely perpetuated in the busy Second Circuit, carries with it the potential to revolutionize appellate procedure in ways neither anticipated nor permitted by Congress, and to spawn a series of voidable appellate determinations. As the validity of the appellate process itself is called into question in a most fundamental manner, this petition raises an issue for review of considerable importance.

As this newly authorized procedure contravenes the quorum requirements of both 28 U.S.C. §§ 46 (b) and (d) and the Second Circuit's own local rule (Local Rule § 0.14(a)), the Second Circuit has so far departed from the accepted and usual course of judicial proceedings, as to urgently call for an exercise of this Court's supervisory power.

I.

THE PETITION SHOULD BE GRANTED BECAUSE ORAL ARGUMENT BEFORE THE SECOND CIRCUIT PROCEEDED WITHOUT A QUORUM IN VIOLATION OF 28 U.S.C. § 46(d) AND SECOND CIRCUIT LOCAL RULE § 0.14(a).

Under 28 U.S.C. § 46(d), a majority of the judges authorized to constitute a panel shall constitute a quorum. Under Second Circuit Local Rule § 0.14(a), two judges shall constitute a quorum, which shall be present on any day appointed for holding a session of the court, failing which the court shall be adjourned.

In this case, there were only two judges present at oral argument and one of those judges thereafter withdrew from consideration of the appeal.

Thus, no quorum existed at oral argument because Judge Calabresi cannot be counted[1] and Judge Altimari absented himself. Under such circumstances, oral argument should not have been had and the court should have been adjourned.

The words "present" and "quorum" have commonly understood meanings which, in each case, include the notion of physical attendance at the event or meeting in connection with which the respective word is being used. Indeed *Black's Law Dictionary* (West 5th Ed.) defines "quorum" as the "number of members of who must be present in a deliberative body before business may be transacted." Webster's New World Dictionary (3d Coll. Ed.) defines "quorum" in virtually identical terms, and defines "present" as "being at the specified or understood place; at hand; in attendance".

In the Second Circuit below, Judge Newman conceded that the appeal was heard and determined by a two-judge panel consisting of one judge (Judge Newman) who was present at oral argument and one judge (Judge Altimari) who was absent

---

1. Conceding for purposes of present argument that the "remote circumstance" referred to by Judge Newman (App. C at 31a) constituted a basis for Judge Calabresi's recusal or disqualification, it follows that the summary order certainly must be vacated, not only because no quorum was present, but because the participation in the deliberative process of a judge who should have been disqualified violates due process. *See Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (Brennan, concurring) ("the participation of a judge who has a substantial interest in the outcome of a case ... necessarily imports a bias into the deliberative process ... depriv[ing] litigants of the assurance of impartiality that is the fundamental requirement of due process").

from the oral argument. (App. C at 31a). Under the circumstances, therefore, no quorum was present, in violation of both federal statute and the court's own rules.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S PRACTICE OF ALLOWING PANEL MEMBERS TO BE PRESENT BY LISTENING TO TAPE RECORDINGS OF THE PROCEEDINGS VIOLATES 28 U.S.C. § 46(d) AND SECOND CIRCUIT LOCAL RULE § 0.14(a).

Conceding that its summary order was issued by a two-judge panel, one of whose two members was absent from oral argument, the Second Circuit nevertheless asserted that statutory and Local Rule quorum requirements were complied with because a judge's absence from the bench is not denial of oral argument[2] inasmuch as the Second Circuit tape-records oral arguments and "judges absent from an argument listen to the taped recording." (App. C at 32a).

To permit absent members of a panel to participate in consideration of appeals is to vitiate the concept of quorum contained both in federal statute (28 U.S.C. § 46(d)) and in the Second Circuit's own Local Rules (Rule § 0.14(a)). Moreover,

---

2. Rule 34(a) of the Federal Rules of Appellate Procedure mandates oral argument unless by local rule a panel of three judges finds oral argument is not needed. Rule 34(a) specifies minimum standards that must be met by such local rules which permit dispensing with oral argument. Second Circuit Rule 34 embodies these criteria, and the general rule that oral argument is to be permitted in all cases unless the criteria are unanimously found to be met. The Second Circuit below made no such finding and oral argument was directed to be held.

the practice effectively negates the same Local Rule's requirement that the two judges who constitute a quorum attend on the day appointed for holding a session of the court.

To be "in attendance" is the very definition of being present. To be absent is the very opposite of being present; indeed the definition of the word absent is "not present." Just as "quorum" requires presence at an assembly or meeting, "presence" requires "attendance," and its very meaning is destroyed by permitting absence to form any part of its meaning.

The Second Circuit's tape recording practice, while manifestly convenient in that it permits one (or perhaps all) of the judges constituting a quorum of a panel to absent themselves from oral argument, does not comport with 28 U.S.C. § 46(d) or Local Rule § 0.14(a).

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S SUMMARY ORDER WAS ISSUED BY A TWO JUDGE PANEL OF VARIABLE CONSISTENCY IN VIOLATION OF 28 U.S.C. § 46(b).

The Second Circuit's summary order of October 31, 1997, affirming the Order and Judgment of the district court was issued in direct violation of 28 U.S.C. § 46(b), which mandates the hearing and determination of appeals by three-judge panels.

This statutory requirement that a panel of three judges determine appeals was enacted into law to curtail the practice under which some circuits were routinely assigning cases to two-judge panels. *Murray v. National Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994), *cert denied*, 513 U.S. 1082 (1995). The statute makes clear that a panel of three judges is

mandatory, the sole exception being a judge who cannot sit because "recused or disqualified" or when the Chief Judge certifies an "emergency . . . such as the unavailability of a judge of the court because of illness."[3]

Second Circuit Local Rule § 0.14(b), authorizing determinations of an appeal by two judges under certain circumstances, must be evaluated in light of the statutory mandate. The Second Circuit's decision in *Murray* is instructive in that regard. In that case, the Second Circuit stated that the purpose of the exception to the three-judge panel rule as contained in Local Rule § 0.14(b) "is obviously intended to permit the Court to conduct its business expeditiously despite the unanticipated unavailability of one member of a three-judge panel." *Id.* at 47. The "unanticipated unavailability" of a judge requires that a judge "becomes unable to participate." *Id.* As the legislative history of § 46(b), cited by the Second Circuit, demonstrates:

> The circuit courts could continue to adopt local rules permitting the disposition of an appeal in situations in which one of the three judges *dies* or *becomes disabled* . . .

Id., *citing* S. Rep. No. 87–275, 97th Cong. 2d Sess. 9, *reprinted in* U.S.C.C.A.N. 11, 19 (emphasis added). In interpreting this legislative pronouncement, the Second Circuit stated that "[t]he fact that the Senate Report identifies death or disability does not preclude unavailability because of late discovered disqualification." *Id.*

---

3. The benefits of the statutory requirement of a three judge panel have been set forth by Circuit Judge Mikva in *United States v. Glover*, 731 F.2d 41, 51 (D.C. Cir. 1984) (dissenting op.), in which he referred to such pluralism as "the benchmark of the appellate process." He stated that "[t]he touchstone for this pluralism is a belief that the more minds consider a matter, the better the ultimate resolution of the case is likely to be." *Id.*

Absent death, disability or late-discovered disqualification, however, it is clear from the statute, the legislative history and the Second Circuit's decision in *Murray*, that a panel of three judges is required. No local court rule may dispense with this statutory requirement. *See, e.g., Wingo v. Wedding*, 418 U.S. 461 (1974) (invalidating a local court rule as inconsistent with the laws of the United States). *Cf. Ortega-Rodriquez v. United States*, 507 U.S. 234 (1993) (procedural rules promulgated by a court of appeals may not violate the constitution or a statute) (Rehnquist, J., dissenting).

Second Circuit Local Rule § 0.14(b), however, is in pertinent part inconsistent with this requirement. It provides that a panel of two judges of the Second Circuit may determine an appeal:

> if a judge of a panel of the court which has heard argument or taken under submission any appeal, petition or motion shall be unable to continue with the consideration of such matter by reason of death, illness, resignation, or incapacity, *or shall be relieved of such consideration at the judge's request . . .*

(emphasis added). Under the highlighted portion of this Local Rule, two members of a panel may determine an appeal simply if a judge requests to be relieved without being "unable to continue . . . by reason of death, illness, resignation, or incapacity," or a late-discovered disqualification. A rule permitting a judge otherwise to simply "withdraw" is inconsistent with the law that Congress passed to discourage two member panels. Therefore, Second Circuit Local Rule § 0.14(b), insofar as it permits two judges of a panel to determine appeals without the third judge being recused, disqualified or otherwise unavailable by reason of a certified "emergency," is invalid as inconsistent with a law of the United States and, thus, beyond the rule-making authority of the Second Circuit.

The Second Circuit's summary order recites (at footnote *) that after oral argument, Judge Calabresi "withdrew" from the panel. (App. A at 1a). Subsequently, in its decision on the Petition for Rehearing, the Second Circuit disclosed that Judge Calabresi had recused himself, upon realizing that one of the parties is the father of a friend of his wife, a circumstance (supporting a decision to recuse) described by Judge Newman as "remote." (App. C at 31a). In effect, Judge Calabresi's withdrawal is precisely the sort of self-requested declination to continue with the consideration of an appeal which, because permitted by the Rule, runs Second Circuit Local Rule § 0.14(b) afoul of 28 U.S.C. § 46(b), and hence invalid.[4]

However, even if Judge Calabresi's withdrawal from the panel for "remote" reasons is overlooked, no justification whatsoever is presented for Judge Altimari's withdrawal from the panel before oral argument. The decision on the Petition for Rehearing merely states that Judge Altimari was "necessarily absent from the courtroom during oral argument" (App. C. at 28a). If Judge Calabresi's withdrawal after oral argument upon "remote" grounds is arguably violative of 28 U.S.C. § 46(b) for want of a satisfactory basis, then Judge Altimari's unexplained absence from the panel before oral argument is certainly contrary to that statute for lack of any basis whatsoever.

Oral argument is a critical phase of the appellate process. Indeed, Second Circuit Local Rule § 34(d) permits the Court to

4. In addition to whatever benefits may have inured to petitioners from consideration of their appeal by the statutorily-mandated three judge panel, Judge Calabresi's withdrawal may have made a significant procedural difference if he would have been inclined to dissent, since the Second Circuit's order of October 31, 1997 was a summary order issued pursuant to Second Circuit Local Rule § 0.23. Under the Second Circuit's Rule § 0.23 the court may not dispose of a matter by summary order unless the decision is unanimous.

withhold oral argument only upon unanimous determination of a three judge panel, and that after the parties are afforded opportunity to file a statement supporting hearing oral argument.

When Judge Altimari absented himself prior to oral argument and without explanation, in effect, a two judge panel was formed in violation of 28 U.S.C. § 46(b). When Judge Calabresi withdrew after oral argument, a situation was created in which oral argument was effectively held before only one judge. Thereafter, a round of judicial "musical chairs" ensued wherein Judge Altimari, who should have remained with the panel in the first instance and who missed the crucial oral argument, sought to rejoin the panel for purposes of decision. As a result, in essence, the plaintiffs were denied effective oral argument without notice or determination, in violation of Local Rule § 34(d), and had their appeal effectively determined by a panel reduced to a single judge, Judge Newman, the only judge participating in both the argument and decision phases of the appellate review.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD I. RHINE
Counsel of Record
R. JEFFREY MORE
COLEMAN & RHINE LLP
Attorneys for Petitioners
1120 Avenue of the Americas
New York, New York 10036
(212) 840-3330

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 31, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 31st day of October one thousand nine hundred and ninety-seven.

PRESENT: HONORABLE JON O. NEWMAN,
HONORABLE FRANK X. ALTIMARI,*
Circuit Judges.

---

* Honorable Guido Calabresi withdrew from the panel after oral argument, and the appeal is being disposed of by the remaining members of the panel, who are in agreement. *See* Second Circuit Local Rule § 0.14(b); *Murray v. National Broadcasting Company*, 35 F.3d 45 (2d Cir. 1994).

Appendix A

97-7423

WHITEHALL TENANTS CORP.; ET AL.,

Plaintiffs-Appellants,

v.

WHITEHALL REALTY CO., a partnership, ET AL.,

Defendants-Appellees.

* * *

Appeal from the United States District Court for the Southern District of New York (Sidney H. Stein, Judge).

This cause came on to be heard on the transcript of record from the United States District court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

The conversion of the Whitehall residential apartment complex (the "Whitehall") to a cooperative is surrounded by a long and tortured litigation history, of which this case is the most recent — and hopefully the last — installment. Because the parties have related that history in great detail, we do not repeat it here. The Whitehall Tenants Corporation (the "tenants' corporation") and several of its shareholders bring a putative class action in which they seek damages pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"),

18 U.S.C. § 1961 *et seq.*, against the sponsors of the conversion of the Whitehall. They also make supplemental state law claims for fraud, breach of fiduciary duty, breach of contract, and unjust enrichment. The district court (Sidney H. Stein, J.) granted summary judgment on behalf of the defendants. The plaintiffs now appeal. We conclude that their arguments are meritless, and affirm.

A four-year statute of limitations applies to civil RICO actions. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 152 (1987). A cause of action accrues under RICO at the time that the plaintiff "discovered or should have discovered the injury." *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988). This action was filed on December 8, 1994, so any claim of which the plaintiffs had actual or constructive knowledge prior to December 8, 1990 is barred.

The plaintiffs' claims can be grouped into six categories: (1) the Whitehall Offering Plan contained misrepresentations about the brickwork in the building's exterior curtain wall or facade; (2) it contained misrepresentations in regard to asbestos in the building; (3) it misrepresented the size of the parcel on which the Whitehall is located; (4) it misrepresented the number of parking spaces at the Whitehall; (5) the defendants committed fraud with respect to the Whitehall's insurance policy; and (6) the defendants obtained a revenue ruling fraudulently, thereby creating a potential tax liability in the plaintiffs. We conclude that none of these claims is viable.

1. In the First Amendment to the Offering Plan, the defendants promised to make necessary repairs to the cavity of the curtain wall, and also to maintain the exterior or visible portions of the brickwork for a period of ten years. The original

complaint in *Whitehall Tenants Corp. v. Estate of Olnick*, Index No. 498/89 (N.Y. Sup. Ct.) (*"Whitehall I"*), filed on June 6, 1988, included a claim by the tenants' corporation that the defendants "ha[d] not repaired and will not repair the brickwork at its own cost and expense," as it had agreed to do in the amended Plan. Moreover, as early as 1983, shareholder plaintiff Horace Bullard and another individual filed suits alleging that there were structural problems with the curtain wall, and that all of the brickwork would have to be replaced. Nevertheless, the plaintiffs now argue that, prior to 1993, they did not have knowledge of the defendants' failure to perform the promised masonry reconstruction work on the curtain wall's cavity. But the plaintiffs had reason to know that there were structural problems with the wall as early as 1983, and that the defendants were not performing the repair work to fix those problems, despite their agreement to do so, no later than 1989. It follows that plaintiffs' claim accrued at least by 1989, *see Bankers Trust*, 859 F.2d at 1102–03; *Cullen v. Margiotta*, 811 F.2d 698, 725 (2d Cir. 1987), and is untimely.

The claim, moreover, is not saved by equitable tolling under the doctrine of "fraudulent concealment." The Supreme Court recently held that, in the RICO context, a defendant's fraudulent concealment of its unlawful conduct only tolls the running of the statute (or equitably estops the defendant from raising a limitations defense) if (1) the plaintiff lacked actual knowledge of the defendant's unlawful activities, (2) the defendant took "affirmative steps" to conceal its actions, and (3) the plaintiff exercised "reasonable diligence" in trying to discover the cause of action. *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1993 (1997). The Supreme Court also held that the district court in *Klehr* had made a "highly fact-based" determination that the petitioners reasonably, at some earlier point, should

have discovered the injuries they had suffered from the alleged fraud. *Id.* at 1992. The Court declined to second-guess that decision. *Id.*

The plaintiffs in this case ask us to read *Klehr* as standing for the principle that the question of "reasonable diligence" is *always* "highly fact-based" and can never be the subject of summary judgment. We do not believe that *Klehr* imposed any such rule. And, on the record before us, we conclude that the plaintiffs have failed to present any evidence giving rise to a genuine issue of material fact as to reasonable diligence. One of the 1983 suits alleging problems with the brickwork was brought by a named shareholder plaintiff in the instant case, and the tenants' corporation brought *Whitehall I.* Under these circumstances, no reasonable jury could conclude that the plaintiffs lacked actual knowledge of the curtain wall's defects and of the defendants' failure to repair them as promised. There is, moreover, no support in the record for the notion that the plaintiffs were reasonably diligent in attempting to discover the cause of action but nonetheless failed to find it.

2. The plaintiffs concede that the amended complaint in *Whitehall I,* filed November 30, 1989, contained a claim about asbestos identical to the one made here. They argue, however, that, under *Cullen,* the four-year statute of limitations was tolled by *Whitehall I.* We disagree. In *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974), the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. *Cullen* held that, in accordance with this principle, the statute of limitations in a civil RICO action could be tolled by a putative

class action alleging state law claims that concerned the same wrongful acts as the subsequent RICO claims, even though the suits would be premised on different legal theories. 811 F.2d at 720–21.

Whitehall I, however, was not a putative class action. And, in arguing that *Whitehall I* does not have preclusive effects on the instant action, the plaintiffs concede that there was no privity between the plaintiff in *Whitehall I* — the tenants' corporation — and the individual shareholder plaintiffs here. Hence, neither the *American Pipe* doctrine nor its application in *Cullen* can be read to toll the statute of limitations on the asbestos-related RICO claims. Res judicata precludes the tenants' corporation from making the claim (because it was the party plaintiff in the earlier action), while the statute of limitations bars the individual plaintiffs (because they were not).

3. The statute of limitations also bars the plaintiffs' claim that the defendants in the Offering Plan misrepresented the size of the parcel on which the Whitehall is situated. Since at least 1988, the plaintiffs have had access to the Whitehall deed, which contains an accurate statement of the property's metes and bounds. And, under New York law, they are charged with knowledge of all deeds filed with the proper authorities. *See Doyle v. Lazarro*, 306 N.Y.S.2d 268, 270 (App. Div. 1970), *aff'd* 353 N.Y.S.2d 740 (1974). We agree with the district court that, in light of the patent internal inconsistencies in the description of the parcel size in Whitehall Offering Plan, there is no genuine issue of material fact that, by 1988, the plaintiffs were on notice, and hence could by reasonable inquiry have discovered the alleged misrepresentations in the size of the property.

4. The plaintiffs' claim that the Offering Plan misrepresented the number of parking spaces at the Whitehall

likewise also accrued prior to December 8, 1990. A similar fraud claim was alleged on November 13, 1990, in *Whitehall Tenants Corp. v. Whitehall Realty Co.*, Index No. 825/91 (N.Y. Sup. Ct.) (*"Whitehall II"*) , by Horace Bullard, Ludwig Bravmann, and the tenants' corporation. Like *Whitehall I, Whitehall II* (which apparently is still pending in state court) is not a class action subject to the *American Pipe* doctrine. And the plaintiffs offer no other ground for the proposition that *Whitehall II* tolls the statute. Nor do we find any. Moreover, the plaintiffs' current RICO claim with respect to the parking spaces could have been brought in *Whitehall II. See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (holding that state courts have concurrent jurisdiction over civil RICO claims). The plaintiffs, could, and did, decline to do so. But this cannot justify their delay in filing the federal RICO action till after the four-year statute of limitations had expired.

5. The only factual allegation supporting the plaintiffs' claim that the defendants committed fraud with respect to the Whitehall's insurance policy is that, in 1989, when the cooperative first began insuring the building under a separate policy, the premium was $10,491 less than it had been under an umbrella policy the defendants had on a number of other buildings. Thus, the claim accrued in 1989, and is barred.

6. The issue of the professional apartments requires a bit more background. Pursuant to a lease between a previous owner of the Whitehall and "560 Third Associates" — an entity consisting of the individually named defendants — the defendants exercised an option to purchase some 10,856 shares of the cooperative that related to professional apartments in the building. *See 560 Third Assocs. v. Whitehall Tenants Corp.*, 601 N.Y.S.2d 905, 906 (N.Y. App. Div. 1993). Under the lease, 560 Third Associates was entitled to the shares if there were no

adverse tax consequences that would result from the issuance of the shares. Although the Internal Revenue Service issued a private letter ruling favorable to 560 Third Associates, the tenants' corporation nonetheless refused to hand over the shares. 560 Third Associates therefore filed suit in state court. The Appellate Division held that the tenants' corporation had failed to comply with a refusal procedure set forth in the lease, under which the corporation was required within sixty days either to raise its concerns about the possible tax consequences of the transaction or to issue the shares. *See id.* Because the corporation did neither, the Appellate Division held that it was no longer entitled under the lease to "raise issues of fact with respect to the Internal Revenue Service ruling submitted with [560 Third Associates'] request for the issuance of shares." *Id.* at 907.

The corporation now claims that the IRS ruling was obtained by fraud, and brings a civil RICO claim on that basis. The district court held that this claim was both barred by the four-year statute of limitations (because in 1989 the tenants' corporation showed that it had knowledge of the possible claim when it asserted a variant of the same claim as an affirmative defense in *560 Third Assocs.*), and precluded by the Appellate Division's decision.

We conclude that *560 Third Assocs.* is dispositive with respect to this issue. The Appellate Division held that the tenants' corporation had failed to demonstrate any genuine issues of material fact regarding the IRS ruling, and that the corporation was barred from raising such issues because it had failed to comply with the refusal procedure to which it had agreed in the lease. Therefore, given our ruling in *Weldon v. United States*, 70 F.3d 1, 5 (2d Cir. 1995) (holding that res judicata precludes consideration of a "fraud on the court" misrepresentation as

long as the party raising it could have litigated it in the original action), *560 Third Assocs.* precludes further claims of fraud by the tenants' corporation with respect to the IRS ruling.[1]

7. Finally, we note, as did the district court, that plaintiffs Walter and Rosemarie Spier stand in a somewhat different position than the other plaintiffs. Their claims are timely because they did not purchase their shares in the cooperative until 1994, and hence, they could not have suffered any injury prior to that time. *See Bankers Trust*, 859 F.2d at 1103 (holding that, until an injury occurs, there is no right to sue for damages under the civil RICO provisions). Given the extensive litigation of all the issues in this case prior to that time, however, the Spiers could not have reasonably relied on any alleged misrepresentations in the Offering Plan. Thus, they have failed to state a cause of action on which relief may be granted.

We have examined all of the plaintiffs' arguments, including their suggestion that the Board of Education Lease misrepresentation claim is sufficiently related to the defendants' other alleged misconduct to satisfy the RICO pleading requirements. *See generally Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983) (listing pleading requirements for

1. The individual shareholders are not affected by any duty the defendants might have been under to give back the shares. Only the corporation would be so affected. It is difficult to tell from this complex record whether the individual shareholders might be damaged if the IRS disclaims the revenue ruling and assesses taxes. But there is nothing in the record to suggest that it has done so. And, if it did, there would be time enough for the individual shareholders to bring any viable damage claims against the defendants. In other words, while many of the plaintiffs' causes of action are barred as untimely because they were brought too late, this cause of action by the individual shareholders, if it exists at all, is premature.

damage claims for RICO violations). We find them to be without merit.

The judgment of the district court is affirmed.

FOR THE COURT,
GEORGE LANGE III, CLERK

By s/ Lucille Carr
Lucille M. Carr, Operations Manager

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 19, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

94 Civ. 8879 (SHS)

WHITEHALL TENANTS CORP., HORACE BULLARD and ITA BULLARD, FRED GRUNBERG, JOSEPH JABLON and MARY JABLON, SUSAN ISAACS, PHILLIP POLLACK, WALTER SPIER and ROSEMARIE SPIER, and LUDWIG BRAVMANN, Individually and as Representatives of the Class of Non-Sponsor Shareholders of Shares in WHITEHALL TENANTS CORP.,

Plaintiffs,

-against-

WHITEHALL REALTY CO., a Partnership, SYLVIA OLNICK As Executrix of the Estate of ROBERT S. OLNICK, RICHARD LANE, and PAUL MILSTEIN,

Defendants.

ORDER

SIDNEY H. STEIN, U.S. District Judge:

Plaintiffs have brought this action to recover for injuries allegedly caused by defendants' conversion of the Whitehall residential apartment complex to cooperative ownership. Plaintiffs seek damages pursuant to the Racketeer Influenced

and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, and also assert claims under New York law for fraud, breach of fiduciary duty, breach of contract and unjust enrichment. Defendants have moved, pursuant to Fed. R. Civ. P. 56(b), for summary judgment dismissing plaintiffs' RICO claim on grounds of res judicata, failure to state a claim, and expiration of the statute of limitations. Defendants have also requested that the Court decline to exercise jurisdiction over plaintiffs' state-law claims in the event that the RICO claim is dismissed.

Summary judgment may be granted "only when the moving party demonstrates that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995) (quoting Fed. R. Civ. P. 56(c)); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Accordingly, in its consideration of defendants' present motion, the Court must "view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when 'no reasonable trier of fact could find in favor of the non-moving party." *Allen*, 64 F.3d at 79 (citations omitted) (quoting *Lund's, Inc. v. Chemical Bank*, 870 F.2d 840, 844 (2d Cir. 1989)). Upon due consideration, IT IS HEREBY ORDERED THAT:

1. Defendants' motion for summary judgment is GRANTED with respect to plaintiffs' RICO claims arising from alleged misrepresentations made in the Offering Plan. Those claims, which involve brickwork, asbestos, parking spaces, and lot size, are all barred by the statute of limitations. In addition, plaintiffs' claim relating to brickwork and asbestos have been finally adjudicated in state court and are precluded by the doctrine of res judicata.

Appendix B

In a RICO action predicated on fraud, a plaintiff's injury occurs when he acts in reliance on the defendant's alleged misrepresentation. *See In re Integrated Resources, Inc. Real Estate Limited Partnership Securities Litigation*, 850 F. Supp. 1105, 116–20 (S.D.N.Y. 1993). The statute of limitations for such a claim is four years from the moment the plaintiff discovers or should have discovered his injury. *Banker's Trust Co. v. Rhoades*, 859 F.2d 1096, 1103 (2d Cir. 1988). A duty of inquiry arise when "the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded," *see In re Prudential Securities Inc. Limited Partnerships Litigation*, 930 F. Supp. 68, 76 (S.D.N.Y. 1996), (quoting *Armstrong v. McAlpin*, 699 F.2d 79, 88 (2d Cir. 1983)); thereafter the burden is on the plaintiff to "demonstrate that [he] remained ignorant of the cause of action until a point in time less than four years prior to the commencement of the action, such ignorance not being attributable to any lack of diligence on [his] part." *In re Integrated Resources, Inc. Real Estate Limited Partnership Securities Litigation*, 851 F. Supp. 556, 568 (S.D.N.Y. 1994).

This action was filed on December 8, 1994. Accordingly, plaintiffs must establish that their alleged injuries were not discovered or reasonably discoverable before December 8, 1990. They have failed to make such a showing here. With the exception of Walter and Rosemarie Spier, the plaintiffs in this case all purchased their Whitehall shares in 1984 or 1986. (*See* Second Amended Complaint ("Complaint") at ¶¶ 7–12).[1]

---

1. Plaintiffs Walter and Rosemarie Spier did not purchase their shares in Whitehall until 1994, and their claims are therefore timely. By the same token, however, they cannot as a matter of law establish that they relied on alleged misrepresentations made by defendants

(Cont'd)

Appendix B

Allegations of misrepresentations regarding the brickwork at Whitehall were made as early as 1981 and were the subject of exhaustive litigation in state court throughout the 1980's. *See, e.g., Whitehall Realty Corp. v. Abrams*, Index. No. 13024/82 (Sup. Ct. N.Y. Co.); *Weinman v. Abrams*, Index. No. 26943/83 (Sup. Ct. N.Y. Co.); *Kleinberg v. Ambassador Assocs.*, Index. No. 6362/82 (Sup. Ct. Bronx Co.). With regard to asbestos, plaintiffs were apprised of potential injuries by June 2, 1987, when the Eleventh Amendment to the Offering Plan disclosed the existence of asbestos in the building. (*See* Affidavit of Kevin Smith in Support of Defendants' Motion ("Smith Aff."), Exh. 21 at ¶ 82.) Similarly, Whitehall shareholders were expressly alerted on April 27, 1990 of potential misrepresentations in the Offering Plan concerning parking spaces. (*See* Smith Aff., Exh. 4.) In any event, plaintiffs have indisputably been on notice of potential fraud concerning brickwork and asbestos at Whitehall since at least November 30, 1989, when allegations involving brickwork and asbestos were asserted by the Cooperative Corporation in *Whitehall Tenants Corp. v. Estate of Olnick*, Index No. 498/89 (Sup. Ct. N.Y. Co.) (*"Whitehall I"*). (Smith Aff., Exh. 20 at ¶¶ 62–73, 87–96.) Similarly, they have been aware of the possibility of fraud concerning parking spaces since at least November 13, 1990, when that claim was alleged in *Whitehall Tenants Corp., Bullard and Bravmann v. Estate of Olnick*, Index No. 825/91 (Sup. Ct. N.Y. Co.) (*"Whitehall II"*). (Smith Aff., Exh. 21 at

---

(Cont'd)
in the Offering Plan in 1984. The disputed nature of such representations was reasonably discoverable, and indeed had been the subject of longstanding litigation, before the Spiers purchased their shares. Accordingly, the Spiers' claims regarding brickwork, asbestos, parking spaces and lot size are dismissed for failure to state a claim on which relief can be granted.

¶ 44.) Because both *Whitehall I* and *Whitehall II* were commenced more than four years before the filing of this action, all claims asserted in those lawsuits are now stale. *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir. 1987), cited by plaintiffs, is not to the contrary. The tolling principles enunciated in that case apply only to class actions, and have never been extended to suits such as *Whitehall I* and *Whitehall II*, which were brought by a corporate entity in a representative capacity.

With regard to alleged fraud concerning the actual size of the Whitehall site, plaintiffs' claim is time-barred on the ground that such injuries were reasonably discoverable more than four years before the commencement of this action. Accrual of the RICO statute of limitations period does not await "leisurely discovery of the full details of the alleged [fraudulent] scheme." *Marlow v. Gold*, 1991 WL 107268 at *7–*8 (S.D.N.Y. June 13, 1991). Plaintiffs have been in control of the Cooperative Corporation since 1988 and have had access since at least that time to the Whitehall deed, which contains an accurate statement of the property's metes and bounds. (*See* Affidavit of Horace Bullard in Opposition to Defendants' Motion ("Bullard Aff."), Exh. P.) Pursuant to New York law, parties in interest are charged with knowledge of a deed filed with the appropriate authorities, *see, e.g., Doyle v. Lazarro*, 33 A.D.2d 142, 143, 306 N.Y.S.2d 268, 269 (3rd Dep't), *aff'd* 33 N.Y.2d 981, 353 N.Y.S.2d 740 (1970), and in light of plaintiffs' vigorous and exhaustive prosecution of numerous other fraud claims arising from the terms of the Offering Plan, it is reasonable to ascribe to them a duty of inquiry regarding discrepancies that might exist between the terms of the deed and those set forth in the Offering Plan. Indeed, the Offering plan itself appears to contain internal inconsistencies regarding the dimensions of the Whitehall lot. (*See* Smith Aff., Exh. 10 at 195–96.) Accordingly, plaintiffs'

RICO claims concerning brickwork, asbestos, parking spaces and lot size are barred by the statute of limitations.

As an additional ground for dismissal, plaintiffs' RICO claims regarding brickwork and asbestos are also barred by the doctrine of res judicata. Res judicata prevents a party, or those in privity with a party, from relitigating an issue that was or could have been the subject of a final judgment on the merits in a prior proceeding. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414, 66 L.Ed.2d 308 (1980). In *Whitehall I*, the Cooperative Corporation asserted fraud claims against defendants regarding brickwork and asbestos at Whitehall. The jury found for the plaintiff, but the verdict was set aside for lack of standing. (Smith Aff., Exh. 22.) On appeal, the Appellate Division reviewed the standing issue and also considered whether the jury's finding of fraud was "supported by the weight of the evidence." (*See* Smith Aff., Exh 23 at 3.) It concluded that the Corporation was "[w]ithout evidence of reliance by its shareholders in the case of the brick curtain wall or intent to defraud by the sponsor in the case of the asbestos," and that "[a]ccordingly, plaintiff's fraud cause of action was properly dismissed as a matter of law." *Whitehall Tenants Corp. v. Estate of Olnick*, 213 A.D.2d 200, 623 N.Y.S.2d 585 (1st Dep't 1995).

The Appellate Division's determination that the essential elements of fraud were lacking was a judgment on the merits for the purposes of res judicata, even though the trial court had set aside the jury's verdict on a different ground and had not reached the issue of sufficiency of proof. (*See* Smith Aff., Exh 22 at 6.) Plaintiffs' collateral attack on the validity of this holding is unavailing; the language of the opinion is clear on its face, and it is not the role of this Court to scrutinize the Appellate Division's compliance with the alleged requirements of the New

York C.P.L.R. Such review is the province of the New York Court of Appeals, which denied an application for appeal on precisely the grounds now asserted by plaintiffs. Finally, for the purposes of res judicata, individual Whitehall shareholders are in privity with the Corporation, which represented their interests in the *Whitehall I* litigation. *See, e.g. Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 277, 317 N.Y.S.2d 315, 320, 265 N.E.2d 739, 743 (1970); *Weisz v. Levitt*, 59 A.D.2d 1002, 399 N.Y.S.2d 720, 721 (3rd Dep't 1977). Accordingly, all plaintiffs in this action are precluded on the ground of res judicata from relitigating claims of fraud in the Offering Plan involving brickwork or asbestos at Whitehall.

2. Defendants' motion for summary judgment is GRANTED with respect to plaintiffs' RICO claim arising from the issuance of Whitehall shares to defendants' affiliate, 560 Third Associates ("560 Third"). That claim is barred by the doctrine of res judicata and also by the expiration of the statute of limitations.

Under the terms of the Offering Plan, 10,856 shares of the Cooperative Corporation were allocated to certain professional apartments within the Whitehall complex. (Complaint at ¶ 55.) 560 Third was the lessor of those apartments at the time of the Whitehall conversion, and pursuant to the terms of its lease (the "Master Lease" or the "Lease") it was entitled to receive the allocated shares upon a showing that such an issuance would not damage Whitehall's status as a "cooperative housing corporation" under the Internal Revenue Code. (*Id.*) The Lease also provided for a specific refusal procedure in the event that the Corporation did not believe the issuance would comply with the tax code. (*See* Defendants' Memorandum of Law in Support ("Def. Mem.") at 17.) On April 6, 1989, 560 Third

submitted a demand for the shares, together with a ruling from the I.R.S. stating that the requested issuance would not adversely affect the Corporation's tax status. (Def. Mem. at 18.) The Corporation refused to issue the shares and also failed to follow the refusal procedures set forth in the Lease; 560 Third then filed suit in state court. (*Id.*) Among its defenses in that action, the Corporation contended that the ruling obtained by 560 Third from the I.R.S. was insufficient to prove that the requested issuance would comply with the tax code. (*See* Smith Aff., Exh. 27 at ¶¶ 33–34.) The trial court denied cross-motions for summary judgment. On appeal, the Appellate Division held that 560 Third had "satisfied the requirements of the Lease" by tendering the I.R.S. ruling, and that the Corporation's failure to follow the Lease's refusal procedures precluded it from raising issues of fact with respect to the validity of that I.R.S. ruling. *See 560 Third Assocs. v. Whitehall Tenants Corp. ("560 Third Assocs.")*, 196 A.D.2d 710, 601 N.Y.S.2d 905 (1st Dept. 1993). Accordingly, the Corporation was ordered to issue the shares. (Complaint at ¶ 164.)

Plaintiffs now contend that they were wrongfully compelled by the state court to issue the shares — and that their tax status was thereby put in jeopardy — because defendants obtained the pivotal I.R.S. tax ruling by means of fraud. (*Id.* at ¶¶ 63–64.) Specifically, they allege that defendants submitted falsified leases to the I.R.S. and concealed certain zoning violations in order to convince the I.R.S. that the professional units in the Whitehall could be converted to residential units "as of right." (*Id.* at ¶¶ 56–62.)

This claim is precluded by the judgment of the Appellate Division in *560 Third Assocs.* The holding in that case — that the Corporation had no right to raise issues of fact with respect

to the I.R.S. ruling because it failed to follow the Lease's refusal procedure — was a final determination for the purposes of res judicata on the issue of the professional unit shares.

Plaintiffs' present claim arises from precisely the same nucleus of operative fact, and it adds little to the arguments that were presented to, and rejected by, the Appellate Division in the prior proceeding.[2] The specific allegation that defendants submitted falsified leases to the I.R.S. was not made in *560 Third Assocs.*, but there is no reason to conclude that such

---

2. Plaintiffs' present argument was prefigured in the Corporation's fifth and sixth affirmative defenses in *560 Third Assocs.*, which asserted that "the tax status of [the Corporation] or its tenant-shareholders would be put in jeopardy" by the requested issuance of shares, and that (despite the submission of a ruling from the IRS), it had not been "conclusively ascertained" that issuing the shares as requested would not have adverse tax effects. Smith Aff., Exh 27 at ¶ 33. This argument was developed further in a letter from the Corporation's attorney to 560 Third Associates, in which it was asserted that the documents submitted to the IRS contained "material representations" that were "misleading and inaccurate," that the IRS ruling was "expressly based on the 'facts and representations submitted,' " and that "[a]ccordingly, in the event of misrepresentations made to the IRS, the ruling would have no 'conclusive' effect." In particular, the Corporation contended that the IRS had been led to believe that "the professional apartments may be converted to residential apartments as a matter of right" and had "expressly relied on such representations in its ruling," when in fact "local zoning laws may well prohibit the conversion of the professional apartments to residential use" and that accordingly "amendment . . . to permit residential use may very well not be 'a matter of right.' " Letter dated June 8, 1989 from Stanley Margolis to 560 Third Associates, Smith Aff. Exh. 28, at 6–7. This letter appears in the record of *560 Third Assocs*, as Exhibit I to the Lane and Smith Affidavits.

a claim would have altered the Appellate Division's decision, which was premised not on the validity of the I.R.S. ruling but rather on the Corporation's failure to follow required procedures under the Lease.

By their present RICO claim plaintiffs simply seek to establish that *560 Third Assocs.* was wrongly decided by the state court, and that the professional unit shares should never have been issued. Such a collateral attack is precisely what the doctrine of res judicata is designed to prevent, *see, e.g. Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428, 69 L.Ed.2d 103 (1981), and in any event, under New York law such a challenge may not be based on an allegation of intrinsic fraud in the original decision. *See Greschler v. Greschler*, 51 N.Y.2d 368, 376, 434 N.Y.S.2d 194, 414 N.E.2d 694 (1980); *Altman v. Altman*, 150 A.D.2d 304, 542 N.Y.S.2d 7, 9 (1st Dep't 1989); *see also In re Slater*, 200 B.R. 491, 495 (E.D.N.Y. 1996). Accordingly, plaintiff's RICO claim is barred by res judicata.

Even if plaintiffs' claim were not so precluded, it would nevertheless be barred by the statute of limitations. Plaintiffs have known of the possibility of fraud by defendants to the I.R.S. since at least 1989, when, as set forth above, a variation on the present RICO argument was asserted by the Corporation as an affirmative defense in *560 Third Assocs.* Plaintiffs have been on inquiry notice of other such frauds to the I.R.S. since that time, and their wholly conclusory assertion that they did not actually learn of the existence of any falsified leases until 1994, (*see* Bullard Aff. at ¶ 33), fails to establish why that alleged fraud was not discoverable through reasonable diligence before December 8, 1990. Accordingly, plaintiffs' RICO claim regarding the issuance of professional unit shares is time-barred.

3. Defendants' motion for summary judgment is GRANTED with respect to plaintiffs' two remaining RICO allegations — those relating to the Board of Education lease and the overpayment of insurance premiums — on the ground that those allegations fail to state a claim on which relief can be granted. In order to recover civil damages pursuant to RICO, plaintiffs have "two pleading burdens." *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir. 1983). First, they must allege that defendants have violated the substantive RICO statute, 18 U.S.C. § 1962, and second, they must satisfy the RICO standing requirements set forth in 18 U.S.C. § 1964(c). *Id.* In order to establish a violation of the substantive RICO statute, it must be shown "(1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invest[ed] in, or maintain[ed] an interest in, or participat[ed] in, (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce." *Id.*, (citing 18 U.S.C. 1962(a)–(c)).

Plaintiffs here assert that defendants "conducted or participated in the conduct of the affairs of an 'enterprise' through a pattern of racketeering activity," and that the enterprise "was at all material times engaged in, and its activities affected, interstate commerce." (Complaint at ¶¶ 83-84, 88.) They further contend that defendants "agreed and conspired to commit at least two or more predicate offenses" constituting mail fraud. (Complaint at ¶¶ 85, 89.) Specifically, plaintiffs' RICO claim rests on two remaining allegations of wrongdoing. First, they assert that defendants, "purportedly acting on behalf of the Cooperative Corporation," executed a lease between the Corporation and the New York City Board of Education, secretly assigned that lease to their own affiliate, and failed to provide the Corporation with any "rents collected under the Board of

Education lease" or with "any remuneration for the use of its name or status." (Complaint at ¶¶ 65–66.) Second, they contend that defendants diverted insurance premiums paid by Whitehall shareholders in an amount "believed to be $600,000" to benefit "properties unrelated to the Whitehall but owned by defendants or entities in which defendants hold an interest." (Complaint at ¶¶ 67–68.)

Even if these allegations are accepted as true for the purpose of this motion, they fall far short of stating a viable RICO claim. Crucially, plaintiffs have failed to plead at least two RICO predicate acts on the part of defendants, as required to establish a "pattern" of "racketeering activity." Plaintiffs' RICO claim in this case is predicated on allegations of mail fraud in violation of 18 U.S.C. § 1341. (Complaint at ¶ 85.) To state a claim for mail fraud as a RICO predicate act, plaintiffs must allege (a) the existence of a "scheme to defraud" and (b) the knowing use of the U.S. mails to further that scheme. *See U.S. v. Gelb*, 700 F.2d 875, 879 (2d Cir. 1983); *Compania Sud-Americana de Vapores, S.A. v. IBJ Schroder Bank & Trust Co.*, 785 F. Supp. 411, 424 (S.D.N.Y. 1992) (*citing U.S. v. Rodolitz*, 786 F.2d 77, 80 (2d Cir.), *cert denied*, 479 U.S. 826, 107 S. Ct. 102 (1986)). Plaintiffs must also satisfy the prima facie elements of common-law fraud, including intent, falsity, materiality, reliance and injury. *See Vapores*, 785 F. Supp. at 424; *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259, 262 (1958).

Such allegations are almost totally absent from plaintiffs' present claims. With respect to the Board of Education lease claim, plaintiffs simply assert that defendants' agent, Eugene Sugarman, "without the knowledge of plaintiff Corporation," executed and then assigned a lease "ostensibly" between the

Cooperative Corporation and the Board, (Complaint at ¶ 65), and that "it was improper for him to falsely represent his title and his authority to execute documents on behalf of the Corporation" in that manner. (Bullard Aff. at ¶ 26.) These assertions do not indicate that Sugarman's actions were part of an intentional scheme to defraud the Corporation by means of the U.S. mails, nor do they allege that Sugarman knowingly misrepresented any material fact to induce plaintiffs' reliance, or that plaintiffs suffered any injury as a result of such reliance.

With respect to their insurance overpayment claim, plaintiffs simply assert, in conclusory terms and upon information and belief, that their premiums were misallocated by defendants to insure other properties. (Complaint at ¶ 67.) This allegation of fraud appears to be based on plaintiffs' discovery, under "suspicious circumstances," that the Whitehall had been insured for several years under an umbrella policy with other properties; that the Whitehall's contribution to the total annual premium on that policy was "more than 8% of the total — even though the Whitehall is one of only fifty (50) buildings covered"; and that the Whitehall paid approximately $10,000 less for insurance after it switched to an individual policy in 1989. (Bullard Aff. at 28–31.)

These allegations are manifestly insufficient to support the elements of a claim for mail fraud, particularly in light of the requirement of Fed. R Civ. P. 9(b) that such a claim be pled with particularity. *See, e.g., McLaughlin v. Anderson*, 962 F.2d 187, 191 (2d Cir. 1992); *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990). Accordingly, plaintiffs have failed as a matter of law to assert substantive RICO violations pursuant to 18 U.S.C. § 1962, and it is therefore unnecessary to proceed to the issue of RICO standing under 18 U.S.C. § 1964. The

Board of Education lease and insurance premium claims are dismissed.

4. Defendants' request for an order dismissing plaintiffs' state law claims is GRANTED. Because plaintiffs' sole federal claim is being dismissed, the question of whether this Court should retain jurisdiction over plaintiffs' state-law claims is a matter of discretion. 28 U.S.C. 1367(c)(3) (Supp. V. 1993); *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994). Section 1367 expressly provides that a district court may decline to exercise supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction." *K.M.B. Warehouse v. Walker Mfg. Co.*, 60 F.3d 123, 131 (2d cir. 1995). It is well settled that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n.7, 108 S.Ct. 614, 619 n.7, 98 L.Ed.2d 720 (1988) (*citing United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L.Ed.2d 218 (1966)). There is no reason to depart from the general rule in this case. To the contrary, the relevant factors of judicial economy, convenience, fairness and comity all weigh in favor of declining jurisdiction here, particularly in light of the longevity of this litigation and the fact that many state-law claims relating to the Whitheall conversion have been thoroughly prosecuted in state courts. Accordingly, plaintiffs' claims pursuant to New York law for fraud, breach of fiduciary duty, breach of contract and unjust enrichment are dismissed.

5. Defendants' request for an order directing plaintiffs' counsel to show cause why sanctions should not be imposed pursuant to Fed. R. Civ. P. 11 is DENIED. A claim "constitutes

a frivolous legal position for purposes of Rule 11 sanctions if, under an objective theory of reasonableness, it is clear . . . that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands. *Morley v. Ciba-Geigy Corp.*, 66 F.3d 21, 25 (2d Cir. 1995) (*citing Caisse Nationale de Credit Agricole-CNCA, New York Branch v. Valcorp, Inc.*, 28 F.3d 259, 264 (2d Cir. 1994). Thus, "not all unsuccessful arguments are frivolous or warrant sanctions." *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990). The positions advanced by plaintiffs in this action, however faulty and ultimately unfruitful they have proven to be, "were not so untenable as a matter of law as to necessitate sanction." *Id.* Accordingly, Defendants' request for the imposition of Rule 11 sanctions is denied.

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment is granted in its entirety. The Clerk of Court is directed to enter judgment dismissing Claim II of the Second Amended Complaint with prejudice and Claims I, III, IV and V without prejudice.

Dated: New York, New York
March 19, 1997

SO ORDERED:

s/ Sidney H. Stein
Sidney H. Stein, U.S.D.J.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JANUARY 9, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1997

Petition for Rehearing
Submitted: November 14, 1997 Decided JAN 9 1998

Docket No. 97-7423

WHITEHALL TENANTS CORP.; HORACE BULLARD; ITA BULLARD; FRED GRUNBERG; JOSEPH JABLON; MARY JABLON; SUSAN ISAACS; PHILIP POLLACK; WALTER SPIER; ROSEMARIE SPIER; LUDWIG BRAVMANN, individually and as representatives of the class of non-sponsor shareholders of shares in Whitehall Tenants Corp.,

Plaintiffs-Appellants,

v.

WHITEHALL REALTY CO., a partnership; SYLVIA OLNICK, as Executrix of the Estate of Robert S. Olnick; RICHARD LANE and PAUL MILSTEIN,

Defendants-Appellees.

Before: WINTER, *Chief Judge*, NEWMAN and ALTIMARI, *Circuit Judges.*

Appendix C

Petition for rehearing of summary order in *Whitehall Tenants Corp. v. Whitehall Realty Corp.*, No. 97-7423 (2d Cir. Oct. 31, 1997). Appellants challenge aspects of two-judge panel procedure, after recusal of third judge.

Petition denied.

* * *

JON O. NEWMAN, *Circuit Judge*:

This petition for rehearing merits a brief opinion because it raises rarely litigated issues concerning the validity of a decision rendered by two judges of a panel after a third judge has recused himself. Though it is settled that a panel from which one judge has recused may render a decision, *see* 28 U.S.C. § 46(d); 2d Cir. R. § 0.14(b); *Murray v. National Broadcasting Co.*, 35 F.3d 45 (2d Cir. 1994), this petition raises the specific issues of whether the decision rendered by the remaining two judges is invalid either (1) because the judge who later recused had participated in the oral argument, or (2) because one of the remaining two judges heard a tape-recording of the oral argument in lieu of personal attendance. These issues are raised by appellants' petition for rehearing of the October 31, 1997, judgment of this Court, rendered by unpublished summary order, *Whitehall Tenants Corp. v. Whitehall Realty Corp.*, No. 97–7423 (2d Cir. Oct. 31, 1997), affirming the dismissal of their civil RICO complaint. We conclude that neither of the two identified circumstances affects the validity of this Court's judgment, and we therefore deny the petition for rehearing.

The panel to which this appeal was originally assigned consisted of Judge Altimari, Judge Calabresi, and myself. Judge

Altimari, who was necessarily absent from the courtroom during oral argument, later heard a tape-recording of the oral argument. Judge Calabresi and I attended the argument and questioned counsel. After the argument, Judge Calabresi recused himself, upon realizing that one of the parties is the father of a close friend of the Judge's wife.[1] This Court's summary order, *see* 2d Cir. R. § 0.23, was issued by a panel consisting of Judge Altimari and myself. Because of the nature of the issues presented by the rehearing petition, the two-judge panel requested the addition of a third judge to the panel to adjudicate the petition, *see* 2d Cir. R. § 0.14(b), and Chief Judge Winter designated himself .[2]

Courts of appeals may hear and determine cases and controversies by panels consisting of three judges. 28 U.S.C. § 46(b), (c). The authority of a two-judge panel to adjudicate a matter in the absence of a third judge originally designated to serve with the panel is established by 28 U.S.C. § 46(d), which provides that "[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum."[3] *See Ayrshire Collieries Corp. v.*

---

1. Footnote * of this Court's summary order reports that after oral argument Judge Calabresi "withdrew" from the panel. Because his withdrawal resulted from recusal, as noted above, we need not consider appellants' contention that a judge's withdrawal from a panel for reasons other than recusal, illness, disability, or death would preclude the remaining two judges from adjudicating an appeal.

2. Judges who participated in a panel decision remain eligible to consider a petition for rehearing. *Edwards v. United States*, 334 F.2d 360, 363 n.2 (5th Cir. 1964) (in banc).

3. Also arguably relevant is subsection 46(b), which provides:
(Cont'd)

Appendix C

United States, 331 U.S. 132, 138 (1947) (comparing two-judge quorum provision for panel of court of appeals with absence of such provision for statutory three-judge district court); *United*

(Cont'd)

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. . . .

There is some uncertainty whether the first "unless" clause permits an exception to the requirement that each panel consist of three judges, or to the requirement that a majority of the three-judge panel must be "judges of that court," either active or senior judges, *see In re Bongiorno*, 694 F.2d 917 (2d Cir. 1982). The structure and juxtaposition of the two "unless" clauses suggest that they are exceptions to the same requirement, but which requirement they modify is unclear. Since subsection 46(d) authorizes two judges of a panel to function as a quorum, it is unlikely that the first "unless" clause of subsection 46(c) was needed to permit two judges to adjudicate a matter in the absence of a third judge, originally designated. The two "unless" clauses probably modify the immediately preceding requirement that two of the three judges must be judges "of that court." If they modify the first stated requirement that a panel consist of three judges, the requirement that two of the judges must be members "of that court" would be a parenthetical aside.

In at least one Circuit, the view has been expressed that the second "unless" clause modifies the requirement that a majority of the panel must be judges "of that court." *See* Charles Clark, *Chief Judge's Order Declaring an Emergency Under 28 U.S.C. § 46(b)* (1991), 28 U.S.C.A. § 46, Historical and Statutory Notes (West 1993).

States v. Allied Stevedoring Corp., 241 F.2d 925, 927 (2d Cir. 1967) (death of third judge); *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953) ("The word *quorum* as therein used [in subsection 46(d)] means such a number of the members of the court as may legally transact judicial business."). We have implemented by local rule the authority for two-judge panels to act in the absence of an originally designated third judge. *See* 2d Cir. R. § 0.14(b) (remaining two judges may act if they are in agreement and neither requests designation of third judge); *Murray*, 35 F.3d at 47–48 (two-judge panel may act where recusal occurs just prior to oral argument).

1. *Judge's participation in questioning prior to recusal.* Appellants' contend that the judgment rendered by the two-judge panel, after Judge Calabresi's recusal, is invalid because he participated in questioning during oral argument, prior to his recusal. Though two-judge panels have often decided appeals after one of the judges hearing argument has recused, *see, e.g., Tagatz v. Marquette University*, 861 F.2d 1040, 1042 n.* (7th Cir. 1988); *Giacalone v. Abrams*, 850 F.2d 79, 80 n.* (2d Cir. 1988); *Love v. Young*, 781 F.2d 1307, 1308 n.* (7th Cir. 1986), this appears to be the first case in which the propriety of a two-judge panel has been challenged because of the recused judge's participation in the oral argument. We think the challenge lacks merit.

A recused judge's participation in questioning during oral argument does not constitute the sort of participation in the deliberative process that might impair the validity of a judgment. Questioning counsel during oral argument is an opportunity to illuminate issues, not resolve them. Though the deliberative process might begin for each judge individually as briefs are read prior to argument, the input of one judge upon the deliberations of panel colleagues normally does not occur until the appeal is finally submitted after argument.

Moreover, though a judge must recuse when his impartiality "might reasonably be questioned," 28 U.S.C. § 455(a), whether or not he is aware of the circumstances giving rise to the basis for such reasonable questioning, *see Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858-61 (1988), lack of awareness "may bear on the question of remedy," *id.* at 859. In the pending case, the remote circumstance that persuaded Judge Calabresi to recuse himself in an abundance of caution had not occurred to him until after the conclusion of oral argument, and the circumstance involved no interest — pecuniary or otherwise — in the outcome of the litigation. Invalidation of the judgment because of his attendance at oral argument is not remotely warranted.[4]

2. *Judge's absence from oral argument when serving as member of two-judge panel.* Appellants also contend that the judgment rendered by the two-judge panel, after Judge Calabresi's recusal, is invalid because one member of that panel was unavoidably absent from the oral argument and gained the benefit of the argument by hearing a tape-recording of it. In appellants' view, the two-judge quorum requirement specified by statute, *see* 28 U.S.C. § 46(d), and local rule, 2d Cir. R. § 0.14(a), is violated when one of the two judges is absent from the oral argument. Again, we disagree.

---

4. We need not rely upon the additional circumstance that, even if Judge Calabresi had participated in the deliberation and decision of this appeal, his vote would not have been decisive. *Cf. Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821–25, 827–28 (1986) (vacating judgment where deciding vote of multi-member court cast by judge with substantial pecuniary interest in outcome, without intimating views concerning remedy where disqualified judge casts a non-decisive vote).

Appendix C

Though our Court provides oral argument unless the panel elects not to have it, after affording the parties an opportunity to show why argument is needed, *see* 2d Cir. R. 34, a judge's absence from the bench is not the denial of oral argument. Oral arguments in this Court are tape-recorded, and judges absent from an argument listen to the taped recording. The judge hearing the tape has received all the benefit of counsel's advocacy. The Judge's absence, at most, deprives the lawyers of the "opportunity" to have the judge ask them questions, surely not a protected right.

The petition for rehearing, and a previously filed motion to vacate the summary order, are denied.[5]

---

5. Appellants maintain in their rehearing petition that since, in their view, this Court's Summary Order "is void *ab initio*," Petition for Rehearing at 4 n. 2, the issues that they believe concern the substantive correctness of the Order "are not appropriately addressed at this time," *id.* This attempt to bifurcate a petition for rehearing is unavailing. Just as an appellant seeking reversal both for lack of district court jurisdiction and for substantive error is obliged to present all arguments within the applicable time limits, so a petitioner for rehearing must present all available contentions within the time provided for such a petition.

No. 97-1671

Supreme Court, U.S.
FILED
MAY 14 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

WHITEHALL TENANTS CORP.; HORACE BULLARD; ITA BULLARD; FRED GRUNBERG; JOSEPH JABLON; MARY JABLON; SUSAN ISAACS; PHILIP POLLACK; WALTER SPIER; ROSEMARIE SPIER; LUDWIG BRAVMANN, individually and as representatives of the class of non-sponsor shareholders of shares in Whitehall Tenants Corp.,

Petitioners,

vs.

WHITEHALL REALTY CO., a partnership; SYLVIA OLNICK, as Executrix of the Estate of Robert S. Olnick; RICHARD LANE; PAUL MILSTEIN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

KEVIN L. SMITH
Counsel of Record
MICHELE L. JACOBSON
JASON WOLKOVE
STROOCK & STROOCK & LAVAN LLP
Attorneys for Respondents
180 Maiden Lane
New York, New York 10038
(212) 806-5400

146403

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

QUESTIONS PRESENTED

1. Whether a case may be validly adjudicated by a panel of two circuit judges under circumstances where one of the three judges originally assigned to hear the appeal recused himself immediately after oral argument?

2. Whether a case may be validly adjudicated by a panel of two circuit judges under circumstances where one of the two judges deciding the case heard a tape-recording of the oral argument in lieu of personal attendance?

PARTIES TO THE PROCEEDING

The parties to the proceeding are contained in the caption of the case. Disclosure pursuant to Rule 29.6 is inapplicable, as none of the respondents has a parent or subsidiary company.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	1
I. The Petition Should Be Denied Because The Court Below Acted In Compliance With 28 U.S.C. § 46 And Second Circuit Local Rule § 0.14.	1
II. The Exercise Of This Court's Supervisory Power Is Not Warranted.	7
Conclusion	9

TABLE OF CITATIONS

Cases Cited:

Aeron Marine Shipping Co., et al v. United States, 26 Cl. Ct. 946 (1992)	4
Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986)	3
Ayrshire Collieries Corp. v. United States, 331 U.S. 132, 67 S. Ct. 1168, 91 L. Ed. 1391 (1947)	2

Contents

	Page
Bruner v. United States, 343 U.S. 112 (1952)	8
FCC v. WJR, the Goodwill Station, Inc., 337 U.S. 265 (1949)	4
In re Bongiorno, 694 F.2d 917 (2d Cir. 1982)	6
McNabb v. United States, 318 U.S. 322 (1943)	8
Moses H. Cone Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983)	7
Murray v. National Broadcasting Co., Inc., 35 F.3d 45 (2d Cir. 1994)	2, 5
Sacher v. United States, 343 U.S. 1 (1952)	8
Thermtron Products v. Hermansdorfer, 423 U.S. 336 (1976)	8
Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) ..	8
Tobin v. Ramey, 206 F.2d 505 (5th Cir. 1953)	2, 4
United States v. Allied Stevedoring Corp., 241 F.2d 925 (2d Cir. 1957)	2
United States v. Marines, 535 F.2d 552 (10th Cir. 1976)	4
Zahn v. International Paper Co., 414 U.S. 291 (1973)	7

Contents

Page

Statutes Cited:

28 U.S.C. § 46 ..... 1, 4, 7

28 U.S.C.A. § 46 6

28 U.S.C. § 46(b) 5, 6, 7

28 U.S.C. § 46(d) 1, 4, 6, 7

Rules Cited:

Federal Rule of Appellate Procedure 34 ..... 4, 9

Second Circuit Local Rule § 0.14 ..... 1, 2, 5, 6

Second Circuit's Local Rule § 0.14(a) 1, 4

Second Circuit's Local Rule § 0.14(b) 2

Second Circuit Local Rule 34 4

Supreme Court Rule 10(a) 1, 7

Other Authorities Cited:

49 C.F.R. § 1.67 4

S. Rep. 275, 97th Cong., 1st Sess. 19 (1981) 6

125 Cong. Rec. S12, 143 (daily ed. Sept. 7, 1979) ... 6

STATEMENT OF THE CASE

Respondent adopts the statement of the facts and procedural history contained in the decision of the Court of Appeals for the Second Circuit below. App. 27a-28a.

REASONS FOR DENYING THE WRIT

The petition's fact-bound claim that the court below violated 28 U.S.C. § 46(d) and the Second Circuit's Local Rule § 0.14(a) does not warrant review by this Court. The decision below, which held that the Second Circuit neither violated the quorum requirement under 28 U.S.C. § 46(d), nor its own Local Rule, was plainly correct. No conflict among the circuits is alleged. The Second Circuit has not, moreover, "so far departed from the accepted and usual course of judicial proceedings" so as to warrant the exercise of this Court's supervisory power under Rule 10(a).

I.

THE PETITION SHOULD BE DENIED BECAUSE THE COURT BELOW ACTED IN COMPLIANCE WITH 28 U.S.C. § 46 AND SECOND CIRCUIT LOCAL RULE § 0.14.

1. The Second Circuit's Summary Order was issued in compliance with the quorum requirements of 28 U.S.C. § 46(d) and its Local Rule § 0.14. While courts of appeal may hear and determine cases and controversies by panels consisting of three judges, the authority of a two-judge panel to adjudicate a matter in the absence of a third judge originally designated to serve with a panel is well-established. Under 28 U.S.C. § 46(d), "[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall

constitute a quorum." *See Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 138, 67 S. Ct. 1168, 1171, 91 L. Ed. 1391 (1947) (comparing two-judge quorum provision for panel of court of appeals with absence of such provision for statutory three-judge district court); *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, 927 (2d Cir. 1957) (finding that where one of three judges of Court of Appeals hearing case dies after expressing his concurrence in disposition adopted by majority, remaining two judges constituted a quorum which could dispose of case); *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953) (finding that "[t]he word quorum as therein used [in subsection 46(d)] means such a number of the members of the court as may legally transact judicial business"). Local Rule § 0.14 implemented by the Second Circuit Court of Appeals, moreover, provides that two-judge panels may act in the absence of an originally designated third judge. *See* 2d Cir. R. § 0.14(b) (remaining two judges may act if they are in agreement and neither requests designation of third judge); *Murray v. National Broadcasting Co., Inc.*, 35 F.3d 45, 47-48 (2d Cir. 1994) (holding that two-judge panel may act where recusal occurs just prior to oral argument).

A quorum existed at each stage in which the court below conducted judicial business. The matter was assigned to a panel of three judges consisting of Hon. Guido Calabresi, Hon. Jon O. Newman, and Hon. Frank X. Altimari. At oral argument there was a two-judge quorum consisting of Judges Calabresi and Newman; the Summary Order was issued by a two-judge quorum consisting of Judges Newman and Altimari; and, finally, the court's decision on the petition for rehearing was decided by a unanimous three-judge panel consisting of Judges Newman and Altimari and Chief Judge Ralph K. Winter.

Petitioners' contention that no quorum existed at oral argument because Judge Calabresi recused himself afterwards

warrants little consideration, as it is based on the misguided notion that the subsequent recusal should work, retroactively, to invalidate the quorum that existed at the time oral argument was held. Other than a citation to the definition of "quorum" contained in *Black's Law Dictionary*, petitioners offer no authority for this proposition.

2. Petitioners' contention that the Summary Order rendered by the two-judge panel, after Judge Calabresi's recusal, is invalid because he participated in questioning during oral argument, prior to his recusal, is likewise without basis in law. The circumstance that persuaded Judge Calabresi to recuse himself — that one of the parties is the father of his wife's close friend — was not discovered by Judge Calabresi until *after* oral argument. App. 28a. Due to the nature of the disqualification, which involved no interest — pecuniary or otherwise — in the outcome of the litigation, and its late discovery, Judge Calabresi's participation in oral argument could not have influenced the outcome of the case.

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986), the only authority cited by petitioners, is inapposite. In *Lavoie*, one of the justices of the Alabama Supreme Court personally had another lawsuit pending involving the same legal issues. 475 U.S. 813, 825 (1986). The interested justice not only cast the deciding vote, but authored the court's opinion as well, which had the clear and immediate effect of enhancing the legal status and settlement value of his own case. *Id.* at 822-25. Upon reviewing those facts, this Court held that the interested justice's participation in the case violated the petitioner's due process rights. *Id.* Unlike the interested justice in *Lavoie*, Judge Calabresi was not aware of any grounds for his disqualification — which, in any event, were not pecuniary in nature — until after oral argument.

3. The quorum provisions contained in 28 U.S.C. § 46(d), and in Second Circuit Local Rule § 0.14(a), are not violated when one of the two judges rendering the decision heard a tape recording of the oral argument in lieu of personal attendance. First, there is no constitutional right to present oral argument. *See, e.g., FCC v. WJR, the Goodwill Station, Inc.*, 337 U.S. 265, 275-76 (1949); *United States v. Marines*, 535 F.2d 552, 556 (10th Cir. 1976). Second, Rule 34 of the Federal Rules of Appellate Procedure permits the appellate court, in its discretion, to decline to hear oral argument of an appeal. Fed. R. App. P. 34.[1] Accordingly, it follows that oral argument need not be attended by the entire appellate panel as a precursor to the judicial determination of a case. *See, e.g., Tobin*, 206 F.2d at 507. In *Tobin*, the Fifth Circuit denied a petition for rehearing in a case where the opinion of the court was written by a judge who was absent during oral argument, holding that, as long as a quorum, pursuant to 28 U.S.C. § 46(d), was attained at the hearing, it was not necessary that the judge writing the opinion was one of the two judges who were present. *Id.*; *see also Aeron Marine Shipping Co., et al v. United States*, 26 Cl. Ct. 946 (1992) (referring to 28 U.S.C. § 46 by analogy in determination that 49 C.F.R. § 1.67 does not mandate that all three members of the Maritime Subsidy Board hear the evidence so long as two members of the board concur).

Petitioners were not denied oral argument. Judges Calabresi and Newman were present during oral argument, constituting a quorum, and Judge Altimari, who was absent during the argument, listened to petitioners' advocacy on audiotape. App. 27a-28a. Petitioners' argument, distilled to its essence, is that Judge Altimari was not able to ask questions of their counsel of record. A judge's presence at oral argument, however, does not

1. Thus, should this Court grant certiorari, the Second Circuit, on remand, could decline to hear oral argument under Rule 34 of the Federal Rules of Appellate Procedure and its Local Rule 34.

guarantee that he or she will question counsel. As the court below noted, "[t]he judge's absence, at most, deprives the lawyers of the 'opportunity' to have the judge ask them questions, surely not a protected right." App. 32a. Certainly, this is not an issue which warrants further consideration by this Court.

4. The Second Circuit's Local Rule § 0.14 does not conflict with 28 U.S.C. § 46(b). Even assuming, *arguendo*, that the two provisions *did* conflict, any such conflict would be immaterial in this instance. There is thus no cause for this Court's review.

Petitioners' premise that 28 U.S.C. § 46(b) mandates a panel of three judges absent death, disability or an emergency certified by the chief judge of the circuit court is faulty.[2] That statute provides in pertinent part:

---

2. Petitioners' reliance on *Murray v. National Broadcasting Co.*, *supra*, is misplaced. In *Murray*, the petitioner objected to the court's determination because one of the three judges initially assigned to hear the appeal recused himself before oral argument. As a result, the determination of the appeal was made by the two remaining judges. The court denied petitioner's request for rehearing on the grounds that "the legislative history [of 28 U.S.C. § 46(b)] makes clear that the statute was not intended to preclude disposition by a panel of two judges in the event that one member . . . becomes unable to participate." *Id.* at 47. The court in *Murray* clarified the intention of the statute by stating that the statute requires that "in the first instance, all cases would be assigned to a panel of at least three judges" but after that "first instance" there is no requirement that three judges actually hear and/or determine the outcome of the case. The court noted that local rules, such as Rule § 0.14, are "obviously intended to permit the Court to conduct its business expeditiously despite the unanticipated unavailability of one member of a three-judge panel." *Id* .

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, *unless* such judges cannot sit because recused or disqualified, or *unless* the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. . . . (emphasis added)

28 U.S.C. § 46(b). Nothing in this provision limits the instances in which a panel of two judges may hear an appeal. The "unless" clause which precedes the recusal, disqualification and emergency exceptions permits an exception to the requirement that a majority of the three-judge panel must be "judges of that court" — it does not mandate a three-judge panel. *See* S. Rep. 275, 97th Cong., 1st Sess. 19 (1981); 125 Cong. Rec. S12, 143 (daily ed. Sept. 7, 1979); Charles Clark, Chief Judge's Order Declaring an Emergency Under 28 U.S.C. § 46(b) (1991), 28 U.S.C.A. § 46, Historical and Statutory Notes (West 1993) (applying exception due to backlog of cases in the Fifth Circuit); *see also In re Bongiorno*, 694 F.2d 917, 918 n.1 (2d Cir. 1982) (examining the legislative history of 28 U.S.C. § 46(b) and finding that Congress' purpose in enacting the rule was to prevent the instability and unpredictability in the law of a circuit that could result if many panels were composed principally of judges from "outside" the circuit). An interpretation of 28 U.S.C. § 46(b) which would mandate three-judge panels would be at odds with 28 U.S.C. § 46(d), which authorizes two judges to function as a quorum.

Local Rule § 0.14, which permits a judge to be relieved from a panel upon his or her request (among other reasons), is not inconsistent with 28 U.S.C. § 46(b). In any event, any alleged inconsistency is not at issue in this case. Recusal of a

judge is expressly stated as an exception to the composition of a panel under 28 U.S.C. § 46(b). Judge Calabresi's late-discovered disqualification is, by petitioner's own concession, a recognized exception under 28 U.S.C. § 46(b). Thus, a two-judge panel would be permitted even under petitioner's analysis. Petitioners mischaracterize the record, moreover, when they argue that Judge Altimari "withdrew" from the panel before oral argument. Judge Altimari was merely absent from the oral argument; he never requested to be relieved from the panel, nor was he.

Based upon the aforementioned analysis, this Court need not review the decision below because the Second Circuit properly issued the Summary Order in accordance with 28 U.S.C. § 46. That statute clearly does not require that the hearing and determination be made by all three judges of an appellate panel. A determination is valid as long as, pursuant to 28 U.S.C. § 46(d), the decision is made by a majority of the judges constituting a quorum. Here, a majority of the judges — two — issued the Summary Order. A quorum was had, and the Summary Order was properly issued. No review by this Court is warranted.

II.

THE EXERCISE OF THIS COURT'S SUPERVISORY POWER IS NOT WARRANTED.

1. Although Rule 10(a) provides that the exercise of the Court's supervisory power is a proper ground for review on a writ of certiorari, this ground is used sparingly, and is most often used where there exists an important or difficult issue of federal practice and procedure. *See, e.g., Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) (reviewing the use of abstention doctrines); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (reviewing the jurisdictional

amount in class actions); *Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976) (reviewing the power of a district court to deny removal from a state court because the district court's docket was too heavy); *Bruner v. United States*, 343 U.S. 112 (1952) (examining the jurisdiction of federal district courts); *Sacher v. United States*, 343 U.S. 1 (1952) (reviewing the scope of federal contempt powers); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946) (reviewing the proper establishment of federal jury panels); *McNabb v. United States*, 318 U.S. 322, 341 (1943) (exercising supervisory authority over the administration of criminal justice in federal courts to review rules of evidence as applied in federal criminal prosecution).

The issue in the case at hand, which is based upon the confluence of peculiar events, simply does not merit attention by this Court. There is no conflict among the circuits. Despite petitioners' dire predictions, nothing in the decision of the court below permits the regular assignment of cases to a panel of two judges or authorizes oral argument to be had before a tape recorder in lieu of a quorum of judges. Simply put, it was coincidental that, in the same case, Judge Altimari could not attend oral argument and Judge Calabresi had to recuse himself as a result of a late-discovered disqualification. This was not a deliberate arrangement, nor can it be characterized as a "newly created procedure." Accordingly, this Court should deny the petition.

2. This Court, moreover, should not waste its limited judicial resources in granting a writ of certiorari in this matter. Petitioners' only remedy, should this Court reverse the court below, would be a remand for a new oral argument. As discussed *supra*, oral argument is not required. The Second Circuit panel to which this action would be remanded — which could be the very same three-judge panel which denied the petition for a rehearing, two of whom issued the Summary Order — could

determine that oral argument is unnecessary under Rule 34 of the Federal Rules of Appellate Procedure and Second Circuit Local Rule 34. Furthermore, inasmuch as the Second Circuit designated its original decision (App. 1a-10a) as a "Summary Order," which may not be cited as precedential authority to the Second Circuit or any other court, only petitioners are affected by the original decision of the court below, and that court's denial of their petition for a rehearing. The decisions below, which were fact-based, will not have any broad or national impact and do not justify review by this Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KEVIN L. SMITH
Counsel of Record
MICHELE L. JACOBSON
JASON WOLKOVE
STROOCK & STROOCK
& LAVAN LLP
Attorneys for Respondents
180 Maiden Lane
New York, New York 10038
(212) 806-5400